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IN THE

Supreme Court of the United States

October Term, 1969

No. 958

LOCAL 182, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Appellant,

v.

NATIONAL LABOR RELATIONS BOARD,
Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

The appellants, pursuant to United States Supreme Court Rules 13(2) and 15, file this their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final decree of the U. S. Court of Appeals and should exercise such jurisdiction in this case.

Opinion Below

The United States Court of Appeals for the Second Circuit delivered an opinion on October 3, 1968. A copy of said opinion is attached to this jurisdictional statement.

Jurisdiction

The appeal herein is from a final decree made and entered by the United States Court of Appeals for the Second Circuit on October 29, 1968. A Notice of Appeal was filed in the United States Court of Appeals for the Second Circuit on December 12, 1968.

The Supreme Court of the United States has jurisdiction to review, by direct appeal, the Judgment and Decree complained of by the provisions of 28 U. S. C. Section 2101.

The statute involved is the National Labor Relations Act, Sections 8 (b) 1 (A) and 8 (b) (2), as amended, 29 U. S. C. Sections 158 (b) (1) (A), (2).

SECTION 8 (b) 1 (A) provides as follows:

> It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

SECTION 8 (b) (2) provides as follows:

> It shall be an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a).

The United States Court of Appeals for the Second Circuit has affirmed the holding of the National Labor Relations Board finding the Appellant guilty of violating the aforesaid sections, by causing an employee's discharge for non-payment of Utica dues without first giving fair notice of his delinquency.

The Question Presented

Did the Appellant violate the aforesaid sections of the National Labor Relations Act?

Do the facts established by the testimony sustain the Judgment of the U. S. Court of Appeals in finding that the statute was violated?

Statement of Case

Harold C. James, an over-the-road driver—came to live in Tonawanda, New York, from Virginia in the year 1951. He worked as a non-union truck driver for about 4 years in Buffalo. Some time thereafter, in 1956, he obtained a job with the Associated Transport, Inc., working out of the company's terminal in Tonawanda, New York. In 1956, he applied for membership in Teamsters Local 449 in Buffalo, New York, having jurisdiction over said terminal. For reasons of its own, Local 449 refused to accept him as a member of its Union. James continued to work for the company for about three years as a non-union man, carrying no union card, and paying no union dues to any local. The Associated Transport, Inc., was then and is now signatory to the "National Master Freight Agreement Covering over-the-road and Local Cartage Employees of Private, Common, Contract and Local Cartage Carriers" effective for the period August 1, 1964 to March 31, 1967, and also signatory to the "New York State Teamsters Joint Council Freight Division Over-The-Road Motor Freight Supplemental Agreement". This "State Supplemental Agreement" covers drivers employed by carriers for the same period of August 1, 1964, to March 31, 1967, in the jurisdiction of a number of unions stated therein, including Utica Teamsters Local 182 and Buffalo Teamsters Local 449 (General Counsel's Exhibit 2).

James, the charging party, often drove a truck into the City of Utica on the business of and as an employee of the Associated Transport, Inc., for a period of about 1½ years while still a non-union member. From 1951 to 1959, James had worked as a truck driver within the area covered by the Agreement as a non-union man, receiving the wages and working conditions won by the Union men but paying no dues to any Union in that area. On a number of occasions he was advised by the business representative of Teamsters Local 182 in Utica, New York that to maintain his job he would have to comply with the Union-Security Contract existing between his employer and Teamsters Local 182 and all the unions covered by and mentioned in Exhibit 2. For a considerable period of time both the employer and the employee turned a deaf ear to Local 182's said representations. Finally, on February 22, 1960—James chose to and did join Local 182, became a member thereof, paid dues to Local 182 for the period February 1960 through September 1962. But, his payment of dues was so irregular during that period that for non-payment of dues he was suspended in July, 1962, and in March, 1963.

DePerno's testimony at Pages 172, 173, and 175.

Page 173:

> "We have members who may be not in good standing on their dues, but they're still members. * * * And we consider them in good standing until the day that we knocked them off the job. * * *"

Page 175:

> "He was a member in suspension who could be reinstated any time he paid his dues before we took action against him. We have a practice because you're dealing with human nature that we don't like to knock people off * * * we hope they come in and pay even though

they're suspended. We don't knock them off the job. They're members in suspension. But when we finally become convinced that this is a bad member we then act and leave order not to collect any more dues. That was done December 30th, 1964."

Finally, on December 30, 1964, for being in arrears for about 2½ years, Local 182 requested the Associated Transport to discharge James from its employment and the company complied with the request.

POINT I

James was lawfully discharged because he was repeatedly delinquent in the payment of his monthly dues to Teamsters Local 182.

James stoutly claimed from the witness stand that he had paid his dues with two money orders issued out of the Post Office in Tonawanda, New York: One issued in February, 1963, for $68.00, and the other issued in January, 1964, for $80.00. When pressed for their serial numbers, he picked out a small piece of paper from his wallet and swore that the two serial numbers which he said he had marked down on that paper (Union's Exhibit 3), which serial numbers were: (A) 2-24,697, 614 and (B) 2-50,410, 511, were the numbers he stated he had copied accurately from the stubs of the two money orders which he claimed he had turned over to the Tonawanda Post Office in order that they might be forwarded to the Washington, D. C. Post Office Headquarters to trace them, after learning that the Teamsters Local 182 office had never received such money orders in 1963 and 1964, as he had claimed. He brazenly sought to buttress this big lie by swearing that (1) he had "shown" these two phantom money orders to Local 182's steward Sandy; (2) that he had gone to the

Tonawanda Post Office "3 times" to trace these mentally contrived money orders the stubs of which he "attached to a card and sent to Washington".

How fortuitous for the truth it developed that he was forced by cross examination to furnish such serial numbers! Cooperative and searching investigation by all the attorneys involved in the case revealed, from the information provided by the Tonawanda Post Office, that the two money orders with the serial numbers furnished by James on the witness stand turned out to be money orders issued: One in 1961, and the other on December 4, 1962, and that no money orders had been purchased by him or issued out of the Tonawanda Post Office in February, 1963, and in January, 1964. His cunning fabrication had been patently exposed! He had been conclusively proved to be a liar and one who sought to defraud and beguile the trial examiner. He had been shown to be completely unworthy of belief. And, having been shown to be a prevaricator in this instance, the law authorizes this learned Court to refuse to accept his version of any other facts which he claims exist in this case. Ananias must be spurned not embraced! (See the stipulation by *all* the attorneys at Pages 105-107), and see James' own admission that he had lied about them!

But, the records show further that even if such invented and non-existent money orders had been real and had been received by the Teamsters office in Utica, and had been credited to his dues account, he would still have been delinquent in dues and would have been discharged from employment. In passing, it might be added that James had produced for inspection at the hearing all the receipts (Respondent Union's Exhibits 2 A thru 2 E) for monies for dues which the Teamster office record card showed him

to have paid for dues. He also produced the stub of the money order which had been returned by the Utica Teamster office for the sum of $100.00 (Respondent Union's Exhibit 1) sent by James in January, 1965, *after* he had been discharged. In sum, he had all the receipts and money order stubs except the money order stubs from the two he claims to have sent to the Fund Office in February, 1963 and in January, 1964. The old Equity Maxim is truly applicable:

> "Equity denies relief to him who enters her Court with unclean hands."

POINT II

The Court's finding that James was not notified of "his obligations under the contract prior to his termination" are contrary to the facts and without basis in law.

It is sincerely believed that both the Union and the National Labor Relations Board ignored substantial parts of the record and drew the wrong conclusions from the facts established at the trial. A more thoughtful and careful reading of the examination of James will clearly reveal his complete awareness of such knowledge and information. Let us cite only a few bits of recorded testimony fully betraying his possession of such knowledge:

FROM THE RECORD

1. (Page 57.)

> "Trial Examiner: Was it your understanding that you, under the contract between the Union and the Company, that you were required to pay dues?
> The Witness: The contract states, sir, that you're required to try to join a union after you work 31 days and thereafter be a member in good standing."

2. (Page 59 and Page 60.)

"Trial Examiner: Well, your payment in January, 1964 (it was proved and admitted beyond cavil that this payment was never made by James) paid you up to—

The Witness: Should have paid me up to December.

Trial Examiner: December of 1964?

The Witness: Yes.

Trial Examiner: And I take it that had you paid—had they received your $70.00 in January, 1964, you would have been a member in good standing at the time you were discharged?

The Witness: Yes, sir. I thought I was all along.

Trial Examiner: Well, were you aware of the fact, Mr. James, that if you didn't keep up your membership in Local 182 that you were subject to discharge under the Union Security provision of the contract?

The Witness: No, I wasn't really aware of it. But I felt that I should keep them up."

In its decision the Circuit Court states:

"He was never notified of his expulsion in 1963 from that Local."

If the court will examine the Union's Exhibit 4, it will observe a notation thereon that James had also been "expelled" on July 1, 1962. This, like when he was "expelled" on March 1, 1963, was shown on said Exhibit and is an automatic bookkeeping procedure required to be followed by the office girl in charge of the receipt of dues, as provided in the Union's By-laws. These "expulsions" do not equal the complete cessation of Union affiliation to the member. Proof of this will be found in said Union's Exhibit 4, the dues payment Union ledger card, which shows that dues were *paid by James* and *accepted by the Union through December,* 1962, six months *after* he was "expelled" on July 1, 1962. The 1963 "expulsion" is in the same category. In neither of the instances of "expulsion",—

July 1, 1962, and March 1, 1963, was James advised of the "expulsion" by the Union. The reason: Because the Union considered him still a member who could pay up his dues at any time until his discharge from employment at the request of the Union. The testimony of Rocco F. DePerno, president of the Union, clearly supports these statements (See Pages 172-173, and 175).

Page 173:

> "We have members who may be not in good standing on their dues, but they're still members * * *. And we consider them in good standing until the day that we knock them off the job * * *."

Page 175:

> "He was a member in suspension who could be reinstated any time he paid his dues before we took action against him. We have a practice because you're dealing with human nature that we don't like to knock people off * * * we hope they come in and pay even though they're suspended. We don't knock them off the job. They're members in suspension. But when we finally become convinced that this is a bad member we then act and leave order not to collect any more dues. That was done December 30th, 1964."

That James fully understood his rights and duties as a member of Local 182 is incontrovertibly shown by his insistence (falsely) that he had paid his dues for the year 1963 and his dues for the year 1964 through *non-existing* money orders which he claimed he had sent to the Union. The Union did not request his discharge until December 30, 1964. It will help in this connection, to call to the attention of the court that James even tried to pay part of his *1965* dues. Company Exhibit 1 is a note written by James to the treasurer of Local Union 182 and says as follows:

"to Mr. Harold Ulrich

Harold.

I sent, $68.00 on Jan. 1964 for Dues apparently it never Got there & post office says I Can't Check on it Because it is over 90 Days.

so I'm sending you the Money for 64 Dues, & rest apply to 65 Dues."

Legitimate it is to ask:

Is James, the proven liar, the innocent worker who did not know his rights and duties as a member of the Union?

Is he the innocent and pure worker who knew nothing about the Collective Bargaining Agreement under which he was working?

Is he a person entitled to any court remedy who walks into court with such unclean hands?

Is he the type of person for whom a court should reverse the findings of the learned trial examiner who saw and heard him lie so cunningly but unsuccessfully on the witness stand?

Reason and equity demand that the court give a "NO" answer to all these questions!

POINT III

The cases cited by the N. L. R. B. in support of its decision are easily distinguishable from our James case.

Two such examples:

(1) The Circuit Court cited the *Philadelphia Sheraton* Case. The facts of this case show clearly the Union's deliberate failure to give the employees involved an honest opportunity to join the Union and then caused their dis-

charge for not having membership in the Union. It violates reason to liken the facts in our James Case to those of this Philadelphia Sheraton Case. (*N. L. R. B. v. Hotel Employee's,* Local 568, 320 F. 2d 254, 258, enfg. 136 NLRB 888.) The Court cited this case for the proposition that the Union failed in its "fiduciary duty" to inform James that his dues were long in arrears and that his continued employment was in jeopardy because of his delinquency in Union dues.

That he recognized his obligation to pay dues to Local 182 is easily seen from his having paid dues to Local 182 for the period February 22, 1960 through September, 1962. Indeed he resolutely but falsely insisted that he had "paid" all the dues for the years 1963 and 1964 by two non-existent money orders and by his sending to the Teamsters Office a money order for $100.00 in January, 1965, "for '64 dues and the rest applied to '65 dues" (See Company Exhibit No. 1).

As was said in International Woodworkers (264 F. 2d 649):

> "The requirement of fair dealings is not limited to Union members; when an individual becomes an employee of a company having a Union Security Clause in its contract, the new employee is not free to join or refuse to join, nor does he have a voice in the selection of his bargaining representatives. He takes the existing union and its contract in effect as one of his conditions of his employment".

(2) The Circuit Court cited the case of IUE Frigidaire Local 801 (General Motors Corp.) v. N. L. R. B., 307 F. 2d 679 enfg. 129 NLRB 1379 & 130 NLRB 1286).

In the above case the employee had worked for General Motors for 30 years. The Union compelled the employer

to discharge him because he had been one month "too late" in applying for membership and offering his dues. The court frowned upon the Union and the employer's action because the unreasonable discharge of the employee had ended his 30 year tenure and had cut off all his Pension rights accumulated over a lifetime of service with General Motors.

How different this Frigidaire Case from our James Case! James *knew* the existence of the Union Security Agreement, knew his obligation to pay dues, and knew he was deliberately in arrears in the payment of such dues! And yet, the Union waited over 2½ years while he was delinquent before it asked the employer to discharge him only for non-payment of his dues.

The learned trial examiner's appraisal of veracity went against him. He found that James was unworthy of belief. He had to decide whom he would believe. I suggest that in such case the examiner, as the trier of fact, had an incalculable advantage. He saw and heard the witnesses. He had a far better basis for determining the issue. Reason and Equity demand that this court reinstate the findings and conclusions of the trial examiner and set aside the Judgment of the United States Court of Appeals.

The Union should not be penalized for having the employer discharge James simply because the Union had waited for 2½ years to ask his discharge for non-payment of dues. Retribution for generosity is injustice. The court should not countenance it.

Conclusion

The judgment of the United States Court of Appeals should be set aside.

Dated: January , 1969.

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Opinion of U. S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 73, 74—September Term, 1968.

(Argued September 19, 1968 Decided October 3, 1968.)
Docket Nos. 32267, 32268

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

against

LOCAL 182, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondent.

Before: MOORE, FRIENDLY and FEINBERG,
Circuit Judges.

Petition to enforce an order of the National Labor Relations Board granting appropriate relief against union which had caused the discharge of employee. Enforcement granted.

JOHN E. NEVINS, Attorney, National Labor Relations Board (Arnold Ordman, General Counsel; Dominick L. Manoli, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel; John D. Burgoyne, Attorney, on the brief), for Petitioner.

GEORGE SCHIRO, Utica, N. Y., on the brief, for Respondent.

FEINBERG, *Circuit Judge:*

The National Labor Relations Board petitions for enforcement of its order against Local 182, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The Board found that Local 182, by causing the discharge of Harold C. James by his employer, Associated Transport, Inc., violated sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, as amended, 29 U. S. C. §§ 158(b)(1)(A), (2), because the union had never properly notified James of his union membership and dues obligations under an existing union security clause. The Board's order contains the usual cease and desist and notice clauses; in addition, it requires Local 182 to notify the company and James in writing that it has no objection to the employment of James and to make James whole for any loss of pay. The Board's original and amended decisions are reported at 156 N. L. R. B. 335 (1965) and 169 N. L. R. B. No. 164 (1968).

Despite the apocalyptic overtones in respondent's brief, *e.g.*, the Board's decision is described as "spawning chaos in the Trucking Industry and in Labor-Management relations," the basic issues before us are narrow: (1) What was the obligation of Local 182 under the Act and (2) did Local 182 meet that requirement? As to the former, the Board held that a union, which seeks to enforce a union security provision against an employee, has a fiduciary duty to deal fairly with him, requiring at the minimum "that the union inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure." *NLRB* v. *Hotel Employees Local 568*, 320 F. 2d 254, 258 (3d Cir. 1963). Section 8(a)(3) of the Act does permit a union operating under a union security clause to cause an employer to discriminate against a union member expelled for non-payment of dues.

29 U. S. C. § 158 (a)(3). But the Board has fleshed out the statute by requiring the union to give reasonable notice to an employee that he will lose his job for non-payment of dues. Perhaps it would have been better in the first instance for the Board to have used its rule-making power to formulate such a "rule." See Friendly, Benchmarks 143-48 (1967). But the rule is now recognized, see, *e.g.*, *NLRB* v. *Hotel Employees Local 568, supra; IUE, Local 801* v. *NLRB*, 307 F. 2d 679 (D. C. Cir.), cert. denied, 371 U. S. 936 (1962), and we regard it as reasonable.

As to whether Local 182 met its obligation, the evidence before the Board showed that: James had been a non-union employee of the company for five out of eight years; it was not clear which of two Teamster locals had jurisdiction over him, although at one time James was a member of Local 182; he was never notified of his expulsion in 1963 from that Local; he worked steadily for nearly two years thereafter without payment of dues or protest from Local 182; in this period, a union security clause was put into effect (as far as the record shows, for the first time); and almost ten months after that, James was discharged without warning or notice. The Board found on this record that Local 182 "never properly apprised James that he was required to join that labor organization under the existing union security clause." The Board argues that on this history of indifference by two locals, Local 182 was required at a minimum to tell James that under the new contract it would no longer tolerate his non-membership and failure to pay dues. We agree.

Order enforced.